

109TH CONGRESS
1ST SESSION

S. 395

To amend the Buy American Act to increase the requirement for American-made content, to tighten the waiver provisions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 16, 2005

Mr. FEINGOLD introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To amend the Buy American Act to increase the requirement for American-made content, to tighten the waiver provisions, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Buy American Im-

5 provement Act of 2005”.

6 **SEC. 2. REQUIREMENTS FOR WAIVERS.**

7 (a) IN GENERAL.—Section 2 of the Buy American

8 Act (41 U.S.C. 10a) is amended—

9 (1) by striking “Notwithstanding” and insert-

10 ing the following:

1 “(a) IN GENERAL.—Notwithstanding”; and

2 (2) by adding at the end the following:

3 “(b) SPECIAL RULES.—The following rules shall
4 apply in carrying out the provisions of subsection (a):

5 “(1) PUBLIC INTEREST WAIVER.—A determina-
6 tion that it is not in the public interest to enter into
7 a contract in accordance with this Act may not be
8 made after a notice of solicitation of offers for the
9 contract is published in accordance with section 18
10 of the Office of Federal Procurement Policy Act (41
11 U.S.C. 416) and section 8(e) of the Small Business
12 Act (15 U.S.C. 637(e)).

13 “(2) DOMESTIC BIDDER.—A Federal agency
14 entering into a contract shall give preference to a
15 company submitting an offer on the contract that
16 manufactures in the United States the article, mate-
17 rial, or supply for which the offer is solicited, if—

18 “(A) that company’s offer is substantially
19 the same as an offer made by a company that
20 does not manufacture the article, material, or
21 supply in the United States; or

22 “(B) that company is the only company
23 that manufactures in the United States the ar-
24 ticle, material, or supply for which the offer is
25 solicited.

1 “(3) USE OUTSIDE THE UNITED STATES.—

2 “(A) IN GENERAL.—Subsection (a) shall
3 apply without regard to whether the articles,
4 materials, or supplies to be acquired are for use
5 outside the United States if the articles, mate-
6 rials, or supplies are not needed on an urgent
7 basis or if they are acquired on a regular basis.

8 “(B) COST ANALYSIS.—In any case where
9 the articles, materials, or supplies are to be ac-
10 quired for use outside the United States and
11 are not needed on an urgent basis, before enter-
12 ing into a contract an analysis shall be made of
13 the difference in the cost for acquiring the arti-
14 cles, materials, or supplies from a company
15 manufacturing the articles, materials, or sup-
16 plies in the United States (including the cost of
17 shipping) and the cost for acquiring the arti-
18 cles, materials, or supplies from a company
19 manufacturing the articles, materials, or sup-
20 plies outside the United States (including the
21 cost of shipping).

22 “(4) DOMESTIC AVAILABILITY.—The head of a
23 Federal agency may not make a determination under
24 subsection (a) that an article, material, or supply is
25 not mined, produced, or manufactured, as the case

1 may be, in the United States in sufficient and rea-
2 sonably available commercial quantities and of satis-
3 factory quality, unless the head of the agency has
4 conducted a study and, on the basis of such study,
5 determined that—

6 “(A) domestic production cannot be initi-
7 ated to meet the procurement needs; and

8 “(B) a comparable article, material, or
9 supply is not available from a company in the
10 United States.

11 “(c) REPORTS.—

12 “(1) IN GENERAL.—Not later than 180 days
13 after the end of each fiscal year, the head of each
14 Federal agency shall submit to Congress a report on
15 the acquisitions that were made of articles, mate-
16 rials, or supplies by the agency in that fiscal year
17 from entities that manufacture the articles, mate-
18 rials, or supplies outside the United States.

19 “(2) CONTENT OF REPORT.—The report for a
20 fiscal year under paragraph (1) shall separately indi-
21 cate the following information:

22 “(A) The dollar value of any articles, ma-
23 terials, or supplies that were manufactured out-
24 side the United States.

1 “(B) An itemized list of all waivers grant-
 2 ed with respect to such articles, materials, or
 3 supplies under this Act.

4 “(C) A summary of—

5 “(i) the total procurement funds ex-
 6 pended on articles, materials, and supplies
 7 manufactured inside the United States;
 8 and

9 “(ii) the total procurement funds ex-
 10 pended on articles, materials, and supplies
 11 manufactured outside the United States.

12 “(3) PUBLIC AVAILABILITY.—The head of each
 13 Federal agency submitting a report under paragraph
 14 (1) shall make the report publicly available by post-
 15 ing on an Internet website.”.

16 (b) DEFINITIONS.—Section 1 of the Buy American
 17 Act (41 U.S.C. 10c) is amended—

18 (1) by striking subsection (c) and inserting the
 19 following:

20 “(c) FEDERAL AGENCY.—The term ‘Federal agency’
 21 means any executive agency (as defined in section 4(1)
 22 of the Federal Procurement Policy Act (41 U.S.C.
 23 403(1))) or any establishment in the legislative or judicial
 24 branch of the Government.”; and

25 (2) by adding at the end the following:

1 “(d) SUBSTANTIALLY ALL.—Articles, materials, or
2 supplies shall be treated as made substantially all from
3 articles, materials, or supplies mined, produced, or manu-
4 factured, as the case may be, in the United States, if the
5 cost of the domestic components of such articles, mate-
6 rials, or supplies exceeds 75 percent.”.

7 (c) CONFORMING AMENDMENTS.—

8 (1) Section 2 of the Buy American Act (41
9 U.S.C. 10a) is amended by striking “department or
10 independent establishment” and inserting “Federal
11 agency”.

12 (2) Section 3 of such Act (41 U.S.C. 10b) is
13 amended—

14 (A) by striking “department or independent
15 establishment” in subsection (a), and inserting
16 “Federal agency”; and

17 (B) by striking “department, bureau, agency,
18 or independent establishment” in subsection (b)
19 and inserting “Federal agency”.

20 (3) Section 633 of the National Military Estab-
21 lishment Appropriations Act, 1950 (41 U.S.C. 10d)
22 is amended by striking “department or independent
23 establishment” and inserting “Federal agency”.

1 **SEC. 3. GAO REPORT AND RECOMMENDATIONS.**

2 (a) SCOPE OF WAIVERS.—Not later than 6 months
3 after the date of enactment of this Act, the Comptroller
4 General of the United States shall report to Congress rec-
5 ommendations for determining, for purposes of applying
6 the waiver provision of section 2(a) of the Buy American
7 Act—

8 (1) unreasonable cost; and

9 (2) inconsistent with the public interest.

10 The report shall include recommendations for a statutory
11 definition of unreasonable cost and standards for deter-
12 mining inconsistency with the public interest.

13 (b) WAIVER PROCEDURES.—The report described in
14 subsection (a) shall also include recommendations for es-
15 tablishing procedures for applying the waiver provisions
16 of the Buy American Act that can be consistently applied.

17 **SEC. 4. DUAL-USE TECHNOLOGIES.**

18 The head of a Federal agency (as defined in section
19 1(c) of the Buy American Act (as amended by section 2)
20 may not enter into a contract, nor permit a subcontract
21 under a contract of the Federal agency, with a foreign
22 entity that involves giving the foreign entity plans, manu-
23 als, or other information pertaining to a dual-use item on
24 the Commerce Control List or that would facilitate the
25 manufacture of a dual-use item on the Commerce Control
26 List unless approval for providing such plans, manuals,

1 or information has been obtained in accordance with the
2 provisions of the Export Administration Act of 1979 (50
3 U.S.C. App. 2401 et seq.) and the Export Administration
4 Regulations (15 C.F.R. part 730 et seq.).

